SUPREME COURT OF THE UNITED STATES.

No. 152.

THE LIVERPOOL, NEW YORK, AND PHILADELPHIA STEAMSHIP COMPANY, CLAIMANTS OF THE STEAMER CITY OF PARIS, APPELLANTS,

vs.

HENRY P. SIMMONS, JOHN RUSSELL, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

Addition to record.—Filed 14th January, 1870.

1 Supreme Court of the United States.

THE LIVERPOOL, NEW YORK & PHILADELPHIA Steamship Company, claimants of the steamer "City of Paris," appellants,
vs.
HENRY P. SIMMONS, JOHN RUSSELL, GEORGE Shepherd, H. W. Godfrey, John H. Allen, R. C. Grace, E. Blackmore, J. K. Clayton, & Charles Stewart.

Deposition of Henry D. H. Thomson, a witness on the part of the appellants, examined by consent before me, Edward L. Owen, a United States commissioner for the southern district of New York, on written interrogatories, with the same effect, and subject to all objections as to the competency of the evidence, as if taken under a commission.

1 Q. What is your name, age, residence, & occupation?
A. My name is Henry D. H. Thomson; aged 48 years; residence at present in the city of New York; and occupation that of merchant.
2 2 Q. Do you know the parties to this action, or either of them; if so, how long have you known them, or either of them?
A. No, sir.
3 Q. Have you or have you not been in the habit of sailing from this port to Liverpool on steamers? If yea, state the number of times you have made that voyage.
A. I have; from eighteen to twenty.
4 Q. Were you or were you not a passenger on the steamer "City of Paris," from New York to Liverpool, on the 14th of April, 1866, when

that steamer, proceeding out of the port of New York, collided with a schooner?

A. I was.

5 Q. Have you been examined as a witness in reference to that collision heretofore?

A. I have not.

6 Q. When did you hear that a suit had been brought or tried in reference to it?

A. I think in 1869.

7 Q. Did you see that collision?

A. I did.

8 Q. What part of the "City of Paris" were you, when it occurred?

A. Standing by the foremast.

9 Q. How long had you been there?

3 A. Shortly after leaving the dock.

10 Q. Where did the collision occur—what part of the bay?

A. I should think off Governor's Island.

11 Q. Describe the position of the schooner & the steamer when you for the first time observed the schooner.

A. I should think the schooner was some four to five hundred yards on our port bow. The schooner was steering towards Jersey City. When I first saw the schooner there were several vessels in the channel-way of the steamer.

12 Q. When you first saw the schooner what was the steamer doing with reference to those vessels?

(Obj. to, but not as to form; taken subject to objection.)

A. In what way do you mean?

13 Q. I speak of her course in reference to those vessels, if you know what it was.

A. I do not know what her course was.

14 Q. Did you observe on that occasion two particular vessels, one on the port & one on the starboard bow of the steamer?

A. I did.

15 Q. Do you know what kind of a vessel the one on the port bow was?

4 A. I think it was a brig.

16 Q. As to the one on the starboard bow, what was that?

A. A ship.

17 Q. Which was fartherest to the southard, the ship or the brig?

A. The ship.

18 Q. Was there anything in the space between them when you first saw the schooner?

A. I do not recollect.

19 Q. When you first saw the schooner where was she in reference to this brig, as to her course and distance?

A. Do you mean from the steamer?

20 Q. I mean how did she appear to you, being on the steamer, to be headed in reference to this brig. And how far off did she appear to be from this brig?

A. I should think she was from two to three hundred yards from this brig when I first saw her, and was heading towards the brig's stern.

21 Q. If she had continued in that direction & on that course how would the steamer have passed her?

(Obj. to.)

A. Under her stern.

22 Q. To what was your attention directed from the time you
5 first saw the schooner?

A. Towards the schooner.

23 Q. State what you saw her do from the time you first observed her until the collision.

A. First I saw her port her helm, then afterwards change it to the starboard.

24 Q. When you say that you saw her port, do you speak from a change in direction, or from seeing her man at the wheel alter his wheel, or from both?

A. From both.

25 Q. Please state what you saw the man at the wheel do?

A. First, I saw him put his wheel hard to port; shortly afterwards change it to starboard.

26 Q. What effect on the schooner's course did the first operation have, as it appeared to your eyes?

(Obj. to.)

A. It seemed to bring her square across the course of the steamer.

27 Q. Where was the schooner when you observed that change?

A. About one hundred & fifty yards off from the steamer.

28 Q. How did the steamer strike the schooner when the two vessels collided?

A. A glancing blow.

6 29 Q. What way had the steamer at the time of the collision? I speak of her motion through the water as it appeared to you.

A. I think she was stopped.

30 Q. How was she going through the water when you first noticed the schooner?

A. About four or five miles an hour.

31 Q. Had you observed any diminution in her motion between that time and the time of the collision?

A. I had.

32 Q. What had you observed?

A. That her course was slower, and apparently was backing at the time she struck the schooner.

33 Q. Could you observe from where you were, whether in the interval between the time you first saw the schooner and the collision, which vessel was going faster through the water?

A. Judging from the eye, the schooner.

34 Q. How much faster?

A. I should think perhaps one or two knots.

35 Q. How much distance did the schooner appear to loose by this change of course?

(Obj. to as leading; question withdrawn.)

7 36 Q. Did you observe whether or not the schooner lost any ground by this change of course of which you have spoken? If so, how much did she appear to you to loose?

(Obj. to.)

A. I think she did.

37 Q. Then state how much?

A. I should think the time was perhaps two minutes.

38 Q. Well, in distance, if you can tell?

A. I cannot state definitely as to distance.

39 Q. Did you see whether or not anybody was knocked overboard from the schooner before the collision?

A. I did not.

40 Q. Did you see anybody jump overboard; if so, who and when?
A. I did; the captain of the schooner; just before the vessels struck.
41 Q. How do you know he was the captain?
A. I heard so, and saw him at the wheel.

Cross-examined by counsel for appellees:

42 Q. How long have you been a merchant & residing in this city?
A. I have resided in this city since 1849, and have been in the
8 mercantile business all that time.
43 Q. When did you return from Europe after this collision?
A. In August; the collision occurred in April.
44 Q. Have you remained here ever since?
A. No, sir.
45 Q. Have you made any other visits to Europe since that time?
A. No, sir.
46 Q. Did the master or any of the officers of the vessel know at the time, or during that voyage, that you saw this collision?
A. I do not know.
47 Q. Have you talked with any person about the circumstances of that collision since that time to the present?
A. I have; with the appellants' counsel.
48 Q. When did you have the conversation with him?
A. I suppose it is about two or three weeks ago.
49 Q. Was that the first conversation with any person, in reference to the circumstances of the collision, that you had since it occurred?
A. I think it was.
9 50 Q. How came you to see the appellants' counsel on the subject?
A. I don't know how that came exactly; I received a note from the appellants' counsel.
51 Q. You say you stood by the foremast, & had been standing there since about the time the vessel left her wharf here; was there any person with you, and what were you doing?
A. No person in company with me; I was watching the ships going to sea.
52 Q. Was there any person standing round about you—near by you?
A. None that I knew or recognized, except the first officer.
53 Q. Was there any person there besides the first officer?
A. I think there was; some sailors under his charge.
54 Q. Did they remain there up to the time of the collision?
A. The first officer and one or two sailors did.
55 Q. What were the first officer and the sailors doing?
A. The first officer appeared on the look-out, and the sailors under his orders.
56 Q. Did you hear any report, by any one, of the schooner?
10 A. I heard the first officer shout, "Schooner on the port bow!"
57 Q. Had you seen the schooner before that?
A. I saw her about the same time.
58 Q. How far is it from the foremast, where you stood, to the bow?
A. I should think about ninety feet.

Re-direct:

59 Q. Which was nearer the bow, you or the first officer?
A. The first officer.
60 Q. How much nearer?
A. I should think twenty to thirty feet.
61 Q. What part of the ship was he on?

A. On the forecastle.

62 Q. Have you got the note you received from me?

A. I have not.

63 Q. Can you state the substance of it?

A. I think the first note I received from the counsel for the appellants was whether I was the Mr. Thomson that was on board of the steamer "City of Paris" at the time of the collision. I came down and told the counsel for the appellants that I was, and gave him a statement of what I knew about the collision.

Re-cross:

64 Q. During the time you were standing by the foremast, before the collision, what were the sailors engaged in doing?

A. They were with the first officer, but I did not notice what they were doing.

65 Q. Had you known the first officer previous to that voyage?

A. It was my first passage in the ship "City of Paris;" I had not known him.

66 Q. Did you have any conversation with the first officer while you were standing by the foremast?

(Obj. to.)

A. Nothing, except that I asked him "If that fellow was going to run into us."

67 Q. Was that before or after you heard him shout?

A. After.

68 Q. How long after?

A. About the same time that he shouted.

H'Y D. H. THOMSON.

Subscribed & sworn to before me this 10th day of January, 1870.

EDWARD L. OWEN,

U. S. Commissioner for the Southern Dist. of New York.

It is consented that the above deposition, when filed in the office of the clerk of this court, may be read on the hearing by either party as if taken under commission, subject to all legal objections as to the competency of the testimony; all objection as to the manner of taking it being waived.

Dated New York, Jan'y 10th, 1870.

T. C. T. BUCKLEY,
For Appellants.

E. A. OWEN,
Counsel for Appellees.

(Indorsed:) Supreme Court of the United States. The Liverpool, New York & Philadelphia Steamship Company, claimants of the steamer "City of Paris," appellants, vs. Henry P. Simmons, John Russell, George Shepherd, H. W. Godfrey, John H. Allen, R. C. Grace, E. Blackmore, J. K. Clayton, & Charles Stewart. Deposition of Henry D. H. Thomson, a witness on the part of the appellants, taken by consent the 10th day of January, 1870. J. W. Gerard, junior, proc. for claimants.

(Indorsement on addition to record:) Supreme Court U. S. 1869, Dec. term. No. 152. Steamer City of Paris, app'ts, vs. Simmons & al. Deposition of D. H. Thomson and stipulation of counsel.

Filed 14th January, 1870.

Supreme Court of the United States.

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Appellants,

vs.

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Respondents.

POINTS FOR APPELLANTS.

T. C. T. BUCKLEY,
R. D. BENEDICT,
Appellants' Counsel.

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Appellants' Brief.

This is an appeal, by the owners of the steamer City of Paris, from a decree of the Circuit Court of the United States for the Eastern District of New-York, affirming a decree of the District Court in favor of the respondents. They, as owners of the schooner Percy Heilner, and of certain property on board, had libelled the City of Paris, to recover the damages alleged to have been by them sustained from a collision between the schooner and the steamer, which took place in New-York Bay, a little below the Battery, on the 14th April, 1866.

The gravamen of the libel (Record, folio 5, page 2) is that the schooner was standing from the East River over to Jersey City to anchor, *and while endeavoring to reach a suitable anchorage,* and being headed about west by north, was run into, and sunk, by the City of Paris striking her on her starboard side.

In the 4th Article of the Libel (page 2 of the Record), it is alleged,

1. That the schooner had a competent look-out stationed and attending to that duty.

2. That she did not alter her course *in any wise to embarass the steamer* (an equivocal allegation, in view of the facts on this point developed by the evidence).

The specific faults charged against the steamer are found in the third Article of the Libel, page 2 of the Record, and are

1. That the steamer was going under a *strong head of steam*, at an improper and dangerous rate of speed through a number of vessels.

2. *No proper look-out.*

3. *That she never slackened her speed or did anything to avoid a collision.*

The allegations of the answer at page 11 of the record, in response to these charges, state

1. That a licensed pilot and the master were on the bridge above the hurricane deck.

2. That the *chief officer* and *a sailor* were on the look-out on the forecastle head.

3. That the *remaining* complement of the ship's company were at their proper positions.

4. That the steamer was going slow, carrying a very small head of steam.

At folio 29, page 11, will be found claimant's accounts of the collision, viz.: When the steamer got below the Battery, and being in the usual *channel, was about shaping her course to pass between two vessels riding at anchor, one off her port, and the other off her starboard bow;* (their bows *being pointed to the eastward,*) the *look-out reported the schooner off the steamer's port bow*; as the schooner had the

wind free, *the steamer's helm was starboarded, and the engine slowed to pass under the schooner's stern. The schooner had no proper look-out, and from that cause* did not *observe either the steamer or the movement the steamer adopted, and in place of keeping her course,* TWICE altered it, first so as to pass astern of the steamer, *and then to cross her bows again.*

As soon as such change of course was perceived, the steamer's engines were stopped and backed, and at the time the collision occurred, the steamer had little if any way on her.

None of the specific charges or faults alleged in the libel against the steamer are *established* by the evidence, or *alluded to* in the opinion of the Court below; but both proceed on the assumption that the fact of a collision between a steamer and a sailing vessel presumptively establishes the liability of former, though the learned District Judge in his opinion, substantially finds,

1. That the evidence shows that the schooner did luff just before the collision.

2. That the schooner was not keeping such a look-out as is required of a sailing vessel when moving across a crowded harbor.

See 1 Benedict's Ad. Reports, p. 180.

FIRST POINT.—The Courts below treated the liability of the steamer as presumptively established by the fact of collision, ignoring, it is respectfully submitted, the rule, "that no presumption of liability arises from that fact" (vide the 'John Frazer,' 21 Howard, 194); and also the principle that "before the loss occasioned by a collision can be fastened on a party, it must be established by preponderating evidence that it was occasioned by his culpable negligence."

If the proofs show that the claimants have endeavored by all means in their power, with due care and proper display of skill, to prevent the occurrence of the accident, there can be no liability.

See also "The Morning Light," 2 Wallace, 560.
Also "The Grace Girdler," 7 Wall, 203.
The "Virgil," 2 W. Rob., 205.
The "Lochlibo," 3 W. Rob., 318.

There is nothing in the sailing rules which conflicts with the above principle.

SECOND POINT.—In this case it is indisputable that the respondents' schooner, with a free wind, was crossing a thoroughfare which was the legitimate track of outward bound steamers. If the law imposes on such steamers the obligation to give way to her, the correlative obligation also exists that the schooner shall observe the movement and do nothing to thwart or impede it.

It is also equally well settled that when a look-out on such a vessel should discern a steamer approaching, the sailing vessel should keep her course, and the steamer has the right to regulate her movements on the basis that that rule will be fully complied with.

The "Saxonia," 15 Law Times, p 113.
Whitridge *vs.* Dill, 23 Howard, 453, as to want of a look-out.
Liverpool S. S. Co. *vs.* Rumball, 21 Howard, 383, 384.
Per Clifford, J., as to correlative obligation above referred to.

1. The imperative nature of the rule, requiring a sailing vessel to keep her course, has recently become the subject of judicial examination and approval at this Court in the case of Bedell *vs.* The Potomac decided in January, 1870.

2. Recent cases in the English Privy Council enforce the same rule with equal strictness. It is held there that it is the duty of the sailing vessel to keep her course; and that she can only be excused from deviating from it by showing that it was necessary so to do in order to avoid immediate danger.

The "Velasquez," Law Reports, P. C., Vol. 1, p. 494, July 20, 1867.
The "Agra," ibid., p. 501.

THIRD POINT.—This schooner did, however, embarrass the steamer by a change of course.

This change was probably the result of another fault, viz.: that she kept no sufficient look-out.

1. The *false manœuvres of the schooner*, viz., *her changes of course before the collision*, are fully established. The claimants on the hearing below produced *five* witnesses, who testify to a change of course, viz:

   a. Harbinson, the pilot, says that when he first saw the schooner she bore from him over the brig on his port bow about southeast, and that he and the captain thought she would go ahead of them; that he then starboarded and slowed, or rather stopped the vessel, as she

was going pretty slow, so as to give the schooner an opportunity to go by. (Page 32, fol. 94.)

That he kept his eye on her as she approached, and saw her luff, and on the strength of that backed the steamer hard; that then the schooner altered her wheel again by heaving it up, and then put it down again; that the man at the schooner's wheel appeared to be in a confused state, frightened, and not knowing exactly what to do. He changed his course three points. (Page 33, fol. 97.)

This man, Harbinson, who had been a Sandy Hook licensed pilot for twenty years, states (page 35, fol. 101), "if the schooner had not luffed she would have cleared our stem (incorrectly printed 'stern,' in record,) 200 yards." It was, he says, the luffing and keeping away again that occupied the time and brought her into the steamer. They did not stop and back when the schooner was first seen, because it was thought she had plenty of room to go ahead; and so she had, he says, if the schooner had kept her course. (Record, page 40, fol. 114.)

b. Lockman (page 41, fol. 118) was a Sandy Hook pilot, and had brought in from sea the brig that was on the port side of the opening through which the steamer passed. He says the schooner was headed to the stern of this brig, and when about abreast of his stern, luffed, and when about half way between the range of his brig's stern and the steamer, kept off again. (Fol. 119.)

c. *Kennedy, the Master*, (page 23, fol. 64,) testified: "*That when* he saw the schooner she was four points on his port bow, and nearly a quarter of a mile off; that he put his helm a-starboard, to go astern of her, and worked the indicator for the engine to go *dead* slow; when the schooner got two points on his port bow her course was altered to come astern of us, and then schooner's course was altered, to cross the steamer's bows for the second time; seeing which, he immediately stopped, and reversed his engines.

d. The testimony of Mathewson, the chief officer, who was on the look-out (page 26, fol. 73), and that of Fulton, another officer (fols. 80 and 81), is to the same effect.

2. On the part of the libellants was opposed the testimony of the Master and part owner of the schooner, who was at her wheel. He states (page 16, fol. 43,) that he did not let his vessel fall off at all, or come up in the wind, but *he admits he altered his wheel*, but says it was only enough to keep her steady.

a. In this statement he is not corroborated by the hands on board. Stewart, one of them, (page 58, fol. 166,) swears he was occupied with the mate and Enoch Blackman, in setting up the main peak, and did not direct his attention to the schooner's course.

b. *Blackman*, who *claimed to be the look out*, at folio 57, p. 21, swears, to be sure, that he observed no change in the schooner's course after the steamer was seen; but the mate, another man and himself were all talking together till just as he saw the two vessels about to strike, and therefore could know very little about what he pretended to testify to. (Vide page 22, fol. 59.) Though pretending to be the look-out, he did not see the steamer till an EXCLAMATION from the mate drew his attention to her.

c. Clayton, folio 54, page 20, didn't watch the wheel, and can't tell how much motion of the wheel would be required to alter her course.

3. The testimony of the Master is full of errors, and is in many things contradicted by his own crew and by the undisputed facts of the case.

a. He swears "that the mate was on the look-out, standing by the forecastle deck *on the windlass* on the starboard side, and that he had been there fifteen to twenty minutes, and that he went there when they were going down the East River.

He also states "that two sailors were forward ready to obey orders, not handling anything." (Page 15, fol. 42.)

In these points he is clearly contradicted by the evidence of Stewart and Blackman, who show from their testimony, that they as well as the mate, must have been amid-

ships tightening up the mainpeak, until a moment before the collision.

b. By curious coincidence with the language of libel, he confesses to an alteration of his wheel, but claims that it was merely to steady the vessel. (Page 16, fol. 43.)

c. It is singular that he states that when the mate called his attention to the steamer, which libellant's counsel admitted was just before the collision, he (the master) did not apprehend that one would occur. (See folio 101.)

d. And it is still more singular that he should swear, as he does, that he "*did not look at the steamer from the time he first discovered her till the time the collision occurred.*" (page 16, fol. 43.) What on earth was he looking at? If he was so frightened that he did not know what he saw, the statement may be believed; otherwise it must be false.

e. The master also claims, in which respect he stands entirely alone, that the steamer did not "stop, but cut us down and went right on over us." (Folio 44, p. 16)

The position of the vessel after the collision, as testified to by Harbinson, the pilot, and young Mr. Camp, answers this most fully; showing conclusively that the steamer struck the schooner about midships, an angling blow ("a little glancing"), says Blackman; "her starboard bow" was more aport of us than her

"port bow." Clayton says steamer held her up by her bowsprit till she carried her a considerable distance, and then slowing or stopping, the ebb tide carried her off and she sunk.

The discrepancies and contradictions above alluded to are of importance when the question is of the comparative credit his testimony is entitled to, when weighed with that of the witnesses produced by claimants, on the hearing below, who tes tified positively that he did change his course.

We give additional evidence in the deposition of Thomson, taken in this Court.

He stood by the foremast of the steamer, an entirely disinterested spectator of all that was going on, and his testimony fully corroborates that of the two pilots, and the officers of the steamer.

4. To sum up, then, the evidence on the question whether the schoonerchanged her course, it stands in this way.

a. Six witnesses swear that they saw her change her course. They are all intelli. gent men, two of them entirely disinterested. The occurrence was in broad day, in plain sight from them, and it is not pretended that they were not looking directly at it.

b. Four witnesses, all interested, contradict it. But three of them admit that they were not

noticing the course of their vessel; and the other, the master, admits that he did alter his wheel, but claims that it was not enough to change his course

c. The master's evidence is itself open to serious criticism.

d. The master and pilot of the steamer charged the master of the schooner with having made this alteration of his course. He did not deny it, but undertook to palliate it. (Folio 66.)

It is no wonder that by lapse of time and the pressure of his interest, he should have persuaded himself that he did not make the change. But his admissions stand against him, and bind the libellants of whom he is one. (The Potomac.)

e. The District Judge, who saw the witnesses, and heard them testify, finds, as a fact, that this change of course was actually made.

f. The ~~pilot~~ master of the steamer is proved, by the libellant's own witness, to have ~~changed~~ charged such an alteration at the very time of the collision. (Fol. 50)

FOURTH POINT.—But it may be said that it is unreasonable to suppose that a careful and prudent master would have so changed his course on the approach of the steamer.

We may admit that. But how if the man has not been careful? How if he fails to keep a look out, and suddenly discovers a vessel near at hand, of whose approach he ought to have been aware long before? Would it not be the instinctive movement of his hand to turn his vessel away from the course of the approaching steamer, and if a half minute's reflection brought him somewhat to himself, and he bethought him that it was his duty to keep his course, would not his return to his former course be as instinctive?

Now we do find this element of negligence in the case. No one on the schooner pretends to have seen this steamer at all until the schooner passed the stern of the brig at anchor.

"When we first discovered the steamer our bows had opened out by the ship's stern, which was on our starboard hand."

Grace, folio 41.

"We were just out clear of this ship, when the mate reported the steamer."

Clayton, folio 53.

"When the mate called out, we had just opened clear of the stern of the vessel that was on our starboard bow."

Blackman, folio 59.

"We had just passed the stern of the ship on our starboard side, when I first saw the steamer."

Stewart, fol. 164.

This shows the grossest negligence. The steamer was a very conspicuous object and in plain sight. The schooner was seen from the steamer long before she reached the brig, and the schooner ought to have seen the steamer at the same time.

Clayton (fol. 53,) and Blackman (fol. 59,) say, that on exclamation from the mate called their attention to the steamer, while Stewart's attention was first called to her by an alarm from the Captain, who was at wheel, rendering it probable that the Captain wa*s three* first person who saw the steamer. (See p. 57, fol *oners*

two

FIFTH POINT.—Here we have established gross neglig an the part of those navigating the schooner, follo by a wrong manœuvre on her part.

omp-

In this connection a proposition, well sustained authority, is to be carefully noted, viz.:

) feet

Where faults of the above description are establis dis- the law presumes that they sustain the relatio*n* to cause and effect to the collision, and the burthe*n* proof is on the party committing them to show ... contrary.

Waring *vs.* Clarke, 5 How., 441.
The Grace Girdler, 7 Wall, 203.

We might, therefore, stop here, and say that the burden of proof being thus cast on the schooner, she has failed to meet it. But the lower Courts have not considered that the burden of proof was on the schooner.

We therefore take up the question in behalf of the steamer, and propose to show that this change of course did cause the collision.

a. The District Judge, while finding that the schooner did change her course, as the claimants allege, says that "the delay caused by it must have been very slight, and to determine positively that it was the cause of the collision would involve a nicer calculation than could be safely based upon the facts proved here."

We may admit that. But how if the man has not been careful? How if he fails to keep a look out, and suddenly discovers a vessel near at hand, of whose approach he ought to have been aware long before? Would it not be the instinctive movement of his hand to turn his vessel away from the course of the approaching steamer, and if a half minute's reflection brought him somewhat to himself, and he bethought him that it was his duty to keep his course, would not his return to his former course be as instinctive?

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Grace, folio 41.

"We were just out clear of this ship, when the mate reported the steamer."

Clayton, folio 53.

"When the mate called out, we had just opened clear of the stern of the vessel that was on our starboard bow."

Blackman, folio 59.

"We had just passed the stern of the ship on our starboard side, when I first saw the steamer."

Stewart, fol. 164.

This shows the grossest negligence. The steamer was a very conspicuous object and in plain sight. The schooner was seen from the steamer long before she reached the brig, and the schooner ought to have seen the steamer at the same time.

Clayton (fol. 53,) and Blackman (fol. 59,) say, that on exclamation from the mate called their attention to the steamer, while Stewart's attention was first called to her by an alarm from the Captain, who was at the wheel, rendering it probable that the Captain was the first person who saw the steamer. (See p. 57, fol 164.)

FIFTH POINT.—Here we have established gross negligence an the part of those navigating the schooner, followed by a wrong manœuvre on her part.

In this connection a proposition, well sustained by authority, is to be carefully noted, viz.:

Where faults of the above description are established, the law presumes that they sustain the relation of cause and effect to the collision, and the burthen of proof is on the party committing them to show the contrary.

Waring *vs.* Clarke, 5 How., 441.
The Grace Girdler, 7 Wall, 203.

We might, therefore, stop here, and say that the burden of proof being thus cast on the schooner, she has failed to meet it. But the lower Courts have not considered that the burden of proof was on the schooner.

We therefore take up the question in behalf of the steamer, and propose to show that this change of course did cause the collision.

a. The District Judge, while finding that the schooner did change her course, as the claimants allege, says that "the delay caused by it must have been very slight, and to determine positively that it was the cause of the collision would involve a nicer calculation than could be safely based upon the facts proved here."

But there is not the slightest difficulty in determining *how much* delay caused this collision. The elements which demonstrate that point are given with certainty.

The schooner was going W. by N., right across the river (Grace, fol. 40), and the steamer was going right down it.

The schooner was 78 feet long, (Grace, fol. 41,) and she was struck about amidships, (Grace, fol. 36; Clayton, fol. 49; Blackman, fol. 57; Kennedy, fol. 65; Harbinson, fol. 97; Lockman, fol. 119.) Thus she needed to have run but 40 feet further to have avoided the collision. Now "the schooner was sailing from 3 to 4 knots at the time of the collision," (Grace, fol. 35,) call it three knots, and she would run 260 feet in a minute, which is 40 feet in less than one-sixth of a minute. Ten seconds of time then, at the most favorable estimate for her, would have saved her.

Thus it is clear that a delay of ten seconds was what did cause the collision, and we submit that it has not required any "nice calculations" to show it. The Judge was right to call it "very slight," but his attention was not apparently called to the clearness and ease of the demonstration that so slight a delay was a sufficient cause.

b. We come next to the question whether the schooner was delayed by her change of course as much as ten seconds, and we think that upon the evidence, it is beyond a peradventure that she was delayed far more than that, and that but for her change of course, she would have been far beyond the steamer's stem, when the latter came down to her.

This change of her course was a decided one.

She put her helm *hard aport.*

Mathewson, fol. 73.

Q. How much change of his course did that make?

A. Why! I suppose it would make *three points—three or four points.* Those schooners swing very quick.

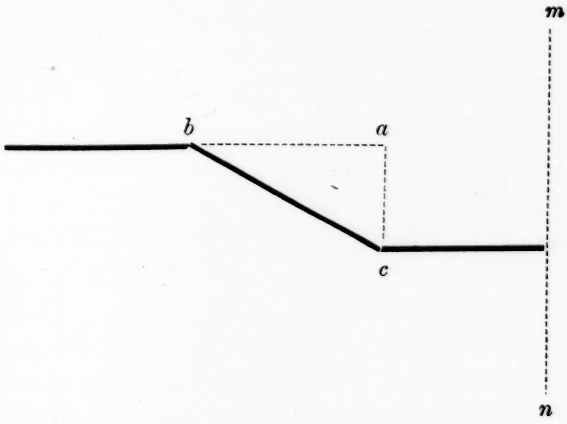
Harbinson, fol. 97.

Getting his wheel down, luffing, *swinging two or three points* up at us.

Harbinson, fol. 100.

I saw him put his helm *hard* to port. Thompson.

Now, with such a change as that, every 100 feet that she ran would cut off 55 feet from the distance that the steamer would have to run to reach her.



Suppose that the schooner changed her course at *b* and ran to *c*, and then resumed it. It is manifest that her new course is just as much nearer

the steamer as the length of the line *a c*, making a right angle at *a*. Suppose, then, that she ran only 100 feet after changing her course three points. In the right-angled triangle *b a c*, if *b c*= 100 feet, and the angle at *b*=33° 45′, then *a c*=55 feet, and *a b*=83 feet. The steamer, then, would have 55 feet less distance to go to reach the line of the schooner's direction, while the schooner would have 17 feet more to go to get past the line of the steamer's direction.

But that 17 feet, at the rate she was running, would account for half of the ten seconds, and the 55 feet cut off from the steamer's distance, would much more than account for the other half, even if she was going four knots an hour.

1. It is not fair, on the evidence, to give the schooner as low a speed as three knots, or the steamer as high a speed as four. The schooner's speed was not checked in the slightest, while the steamer's headway was almost stopped. Grace, fol. 35; Camp, fol. 135; Thompson. Kennedy, fol. 65; Mathewson, fols. 74–75; Fulton, fol. 80.

2. But giving, in every point, the most favorable estimate for the schooner, it is demonstrated that if she ran 100 feet on this changed course, she would lose more than the time requisite to cause the collision.

   Now, how long a time would it take the schooner to have run 100 feet. At the same

estimate of her speed it would take her two-fifths of a minute only.

If the witnesses speak of the time as very short; if they say that the captain "immediately" put his helm back to starboard again, is there anything in that inconsistent with the idea that the operation lasted for two-fifths of a minute?

SIXTH POINT.—Now let us see whether the evidence of the witnesses, who saw this change of course of the schooner, aside from what is said about lost time, warrants the Court in finding that she did run a distance on that changed course, enough to account for the collision.

a. The time when the luff was made is fixed beyond question. It was when the schooner came so far by the stern of the brig as to bring the steamer into view.

1. All the schooner's witnesses agree that that was the first that they saw of the steamer.
   Grace, fol. 41; Clayton, fol. 53; Blackman, fol. 59; Stewart, fol. 164.

2. All the other witnesses who testify on this point, agree that that was the moment of the luff.
   "When she got out of range of the vessel on our port bow, she put her helm hard aport."
   Mathewson, fol. 73.
   "She was just about coming open with the stern."

Harbinson, fol. 95.

"When the schooner luffed she was about abreast of my stern."

Lockman, fol. 119.

b. The first course of the schooner was about 150 yards below the brig.

"They lay about 300 yards apart. I was sailing between the two, about midway.

Grace, fol. 45.

"I should think the schooner was from 50 to 75 yards from the vessel starboard."

Clayton, fol. 50.

"The two vessels lay about 300 yards apart. The schooner went in the middle between them."

Blackman, fol. 57.

"I should think the schooner went within about 200 yards of the ship on our starboard bow."

Stewart, fol. 164.

"I should think about 150 yards below the brig."

Harbinson, fol. 95.

c. But the collision occurred nearly astern of the brig.

"Immediately after we passed the vessel anchored on the port bow." "A ship on each beam."

Mathewson, fol. 76.

Harbinson makes it about 100 yards to west, and 50 yards below the brig." (Fol. 107.)

Therefore, something must have brought the schooner nearer to the line of the brig at the time of the collision. These estimates would make it nearly 100 yards nearer. But 100 feet nearer is ample to account for the collision.

Now her course of west by north is straight across the river.

What, then, brought her nearer to the brig, except a change of her own course?

d. Again, Lockman's evidence is positive that "when the schooner luffed she was about abreast of my stern," and "when he kept off he was about halfway between the range of my stern and the steamer," (fol. 119,) and that distance was about 200 feet, (Kennedy, fol. 70,) or a ship's length, (Mathewson, fol. 76,) or 100 yards, (Harbinson, fol. 77).

Half of either of these distances gives abundance of time for this changed course to have caused the collision.

SEVENTH POINT.—There is another very striking piece of evidence in the case, to which especial attention is called.

Captain Grace, when he was first asked about the position of the steamer, when he first saw her, said she was on his starboard bow. (Fol. 35.) But he was asked again about it, and by the libellant's counsel. (Fol. 45.) And then he says she was "pretty much abeam."

In this he is supported by Clayton, who says "she appeared to be coming right on our beam."

Clayton, fol. 49.

And they all agree that she was then at least 100 to 150 yards off.

Grace, fol. 35;
Clayton, fol. 49;
Stewart, fol. 164.

Blackman says 300 yards off, (fol. 57.)

Now the courses of the vessels were crossing almost if not quite at right angles, and their speed was not far different.

How then could it be that the schooner, making the steamer so far off, and on her starboard beam, did not get by her? If these facts are conceded, there is no accounting for it except by a change of the schooner's course.

Again, Captain Grace admits, that when he saw the steamer, she was 100 to 150 yards off (fol. 36); after that his vessel, he says, ran 100 feet, not 200 feet (fol. 41). Taking either estimate, the libellants are in this dilemma: either the steamer ran twice or three times as fast as the schooner, or the latter must have changed her course nearer to the steamer. But there was no such disparity; the speed was about equal.

EIGHTH POINT.—Even on the assumption that the luffing was a sudden movement just previous to the collision, the rule "*in extremis*" should have no application. The jeopardy was occasioned, and any existing fright produced in judgment of law, not by the proximity of the steamer, but by the neglect of the look-out, which brought libellants' schooner into that position.

The rule in reference to a change of course "*in extremis*," is that a vessel which makes a wrong manœuvre in the fright and hurry of an immediately impending collision, *made imminent by the wrongful act of the other vessel*, shall not be held chargeable for such wrong manœuvre "*in extremis.*" The other vessel is

held responsible for the fright because she has caused it by her wrong action.

But that rule should not extend to the case of a fright, which arises not from the wrongful act of the other vessel, but from previous negligence on the part of the vessel collided with.

If the approaching vessel has been long in sight and should have been seen, her course noticed, and her movements understood, but instead of that she is not seen till the negligent look-out discovers her in close proximity, a wrong manœuvre executed in the fright engendered by that proximity is certainly the fault of the vessel on which is the negligent look-out.

That is exactly the present case.

No excuse can be given for the schooner not seeing the steamer before she did, that is not traceable to the want of a proper look-out, who, if he had been attending to his duty, might have observed that the steamer was starboarding her helm, and endeavoring to go under her stern.

NINTH POINT.—The faults which are charged upon the steamer in the libel are three. (1). Too great speed. (2). Not keeping a good look-out. (3). Not slackening her speed or doing anything to avoid the collision.

1. As to the first, it might be sufficient to say that neither the District nor the Circuit Judge finds that she was going at too high a rate of speed; moreover the evidence shows clearly that no such charge can be maintained.

The captain and pilot both say she was going about five knots before she slowed (Kennedy, fol. 63; Harbinson, fol. 91), which with an ebb tide of a knot and a half (fol. 113) would make her speed by the land six and a half knots, which is not an improper or dangerous rate of speed.

No witness pretends to say that her speed was too great.

2. As to the steamer's look-out there is no dispute but that the mate was placed on the forecastle-head and was keeping a look-out (fol. 72); nor is there any doubt but that he saw the schooner a quarter of a mile off (fol. 73), and at once reported her to the captain (fol. 63).

The Circuit Judge seems to think that she was so near when she was seen as to cause some alarm, a view which was not taken by the District Judge, and which is based only on the facts that the order was given at once, "Hard astarboard." But we submit that that only indicates attention and promptness, and in no way contravenes the fact that the schooner was then far below them.

The fact is shown beyond dispute, that she was seen five minutes and more before the collision, for Kennedy says that, when he saw her he slowed the engine, and ran so until he saw the schooner luff, (fol. 64, 65;) and the engineer testifies by his log that she ran under that slow engine for over five minutes (fol. 85) before she was stopped, and that was before the collision.

3. The charge that the steamer ran on without slackening her speed, or doing anything to avoid the collision is easily shown to be equally groundless.

Her engine was first slowed and her helm starboarded, to give the schooner as much room as possible, and as soon as the schooner's luff was seen, her engine was stopped and backed.

Indeed the District Judge in his opinion finds that "the steamer did all she could after she had undertaken the passage" between these vessels.

But he finds that "she should have stopped sooner," and this is the only fault that he charges upon the steamer.

But whether the steamer is chargeable with such a fault depends upon the question whether the schooner changed her course. We submit, that if the steamer pursued her course in such a way that the schooner, holding on without change, would have passed her, and if she stopped as soon as this change was made, she did all that the law calls upon her to do. She was not bound to stop earlier on the contingency that the schooner might change her course.

TENTH POINT.—What were the circumstances of the case?

The steamer was going down the bay at a proper rate of speed, with officers and men shown to have been competent and vigilant, and actually to have seen the schooner in abundance of time; while those on

board the schooner are shown to have been negligent, and not to have seen the steamer till long after they should have done so.

The Master and Pilot of the steamer, on seeing the schooner, adopted measures to avoid her which they judged to be sufficient, but which failed by reason of a wrongful movement of the schooner, which was seen, not by their eyes alone, but by those of disinterested witnesses who testify that it occurred. This movement of the schooner was enough to account for the failure of the schooner to get by. It was one which was a natural if not a necessary result of the negligent look-out on the schooner. And all this occurred in a crowded harbor, where vessels are compelled to pass each other close at hand, and where the steamer was called upon to consider the safety, not only of this schooner, but of a "large number of vessels, which were then and there anchored or under way," (libel, fol. 5.)

We respectfully submit, that these circumstances are just as imperative in requiring care and caution on the part of the schooner as of the steamer; just as imperative in requiring her to hold her course without variation, and to do nothing to frustrate the movements of the steamer, as upon the steamer to make those movements. We submit that we have shown that the schooner failed in that duty, and we claim that having so failed, the case is no longer one in which "it was the duty of the steamer to have passed the schooner so as to have avoided a collision," but one in which the burden is upon the schooner to show that her change of course did not contribute to the collision. But we think that we have established incontrovertibly that that change was the direct cause of the collision," and we submit finally, that she cannot plead the doctrine of a change

in extremis, because that is a doctrine which can only be urged in behalf of those who have shown themselves vigilant and faithful.

ELEVENTH POINT.—The decree should therefore be reversed, with costs.

T. C. T. BUCKLEY,

R. D. BENEDICT,

Appellants' Counsel.

Evening Post Steam Presses, 41 Nassau St., cor. Liberty, N. Y.

Supreme Court,

OF THE UNITED STATES.

HENRY P. SIMMONS, and others,

Liblts. and Appellees,

ads.

THE LIVERPOOL, NEW YORK and Philadelphia Steamship Company, *Claimants* of the Steamer "City of Paris" her engines &c.,

Appellants.

Appellees' Statement and Points.

This is an appeal by the *Claimants* from a decree of the Circuit Court of the United States, for the Eastern District of New York, in a case of collision which occurred between the steamer "*City of Paris*," and the libellants' schooner "*Percy Heilner*" at about 9 o'clock A. M., of the 14th April, 1866, whereby the schooner with her cargo was sunk and became a total loss.

The record shows that the schooner was on a voyage from Philadelphia to Pawtucket R. I., by the way of

Long Island Sound with a cargo of coal. That having arrived at New York, upon entering the East River the tide was found to be unfavorable for continuing her voyage, and thereupon she put about and stood over between Governor's Island and the Battery, towards the New Jersey shore to anchor.

The weather was fair, the wind about *E N. E.*, and the tide, which was the last of the ebb, was running down the North River at the rate of about 1½ knots an hour, (*fols.* 90, 113.)

The steamer, an iron screw of 1669 tons burthen, 375 feet long, 40 feet beam, with an engine of 600 horse power, (*fol.* 67,) was at the same time going down the North River on her way to sea at the rate of from 7 to 10 miles an hour, her speed being differently stated by the witnesses, (*fols.* 90, 113.)

The river was very full of vessels under way and at anchor, lying with their heads to the eastward athwart the channel, so that it was difficult to find a passage-way for the steamer. (*fols.* 90–92.) The Pilot finally "picked out a passage," which was to run between a brig and ship lying at anchor, the brig being on his port, and the ship on his starboard hand nearly abreast of, but some 300 yards below the brig, (*fols.* 41, 42 45,) which as he says, (*fol.* 92,) was "pretty narrow" for the steamer, (*fols.* 91, 92, 98.)

At the time the steamer was about to enter this narrow passage, (*fol.* 29,) the schooner was standing over between the same two vessels, and on a course nearly at right angles with that of the steamer, and the collision occurred soon after she opened out from behind the brig, the steamer striking her a square blow on her starboard side, (*fols.* 35, 41, 43.)

Although the schooner had been for some time previously standing on such course in full view of the steamer (*fol.* 116), yet she was not seen or reported until after the steamer had approached within 400 yards of her, nor until just as she opened out from behind the brig. The steamer's wheel was thereupon put hard to

starboard to pass under her stern, but from fear of running into the brig and causing greater damage, it was reversed and put to port. After she struck she continued on, pushing the schooner before her, until she had passed the ship which was so at anchor on her starboard hand, when she backed off and the schooner immediately sunk. (*Fols.* 99, 109, 110.)

The cause was tried before the Honorable Charles L. Benedict, Judge of the U. S. District Court for the Eastern District of New York, who decided that the steamer was solely in fault; a decree in favor of the libellants was accordingly entered which, on appeal to the Circuit was affirmed by Mr. Justice Nelson (*fols.* 137, 169). The decision of Judge Benedict may be found in 1 *Benedict's Rep.*, 174, and that of Mr. Justice Nelson is hereto annexed.

POINTS.

I.—The issues which were tried in the Courts below, and which are to be tried in this Court, are of facts, depending for their determination upon the credibility of different witnesses, (some of whom gave their testimony in open Court, in presence of the District Judge,) and the Courts below having concurred in holding the steamer to be solely in fault, the presumptions are that they were correct and unless the appellants point out some palpable error therein, the decree appealed from should be affirmed. (*The ship Marcellus*, 1 *Black*, 417; *Newell* v. *Norton*, 3 *Wall. R.*, 257, 267; *The Hypo ame*, 6 *Wall.* 216, *together with the case in* 8 *Wall.*)

No such error has been pointed out, but the ap-

pellants have attempted to avoid the effect of such presumption by introducing here the deposition of a passenger upon the steamer; but his testimony does not strengthen their case, nor relieve them from the presumption before stated

II.—Waiving, however, the benefit of such presumption, and taking all the testimony into full and careful consideration, the conclusion is irresistable that the steamer was grossly in fault.

(1.) Although an English steamer, she was bound both by the English and the American law, to "keep out of the way" of the schooner and, having failed to do this in open day with the schooner full in view she was *prima facie* in fault. (13 Stat. p. 60, Art. 15; *Eng. Rule*, 1 *Lush. R.*, *Art.* 15 *Appendix*, *p. xxvi*)

(2.) She was not only *prima facie* in fault but she was so absolutely, for she was passing through a fleet of vessels under way and at anchor, requiring more than ordinary vigilance, without any competent look-out

(*a.*) The mate was the only look-out.

The answer alleges, that the "chief officer and one sailor were on the look-out" (fol. 28,) but who the sailor was does not appear. He was not called as a witness, nor spoken of by the witnesses as a look-out. The mate says, (*fol.* 72) "I was on the forecastle head, had been there from the time the ship left the wharf, keeping the look-out."

The *pilot* says (*fol.*103) the mate was forward "with the sailors who were all on the lookout, doing nothing in particular except watching the captain's orders, ready to let go the hawser-ropes and anything else that needed attending to," and the mate was there "to see that they (the sailors) attended to those orders and keeping look-out."

The master says (*fol.* 68) "when the pilot is aboard" the mate's place is forward on the forecastle, that he was there at the time on the lookout with one sailor with him, and that the third officer was before the bridge "to pass orders to the chief officer," that is, to the mate. (*fol.* 62.)

Thomson, the passenger, (whose testimony has been taken in this Court) says the mate was forward with sailors, that the mate "appeared on the lookout and the sailors under his orders," but he did not notice what they were doing. (*Ad. Rec. fols.* 9–10.)

(*b.*) The mate was legally incompetent to act as lookout, because he had other duties to perform (*fol.* 103) in seeing that the men about him executed the orders from the master and pilot, who were on the bridge. (*Chamberlain* vs. *Ward*, 21 *How.*, 548–570.)

(*c.*) Even if he had been competent to act as lookout, still he was inattentive and did not properly perform that duty. This is evident from the fact that he did not report the schooner (although she had been visible for some time previous) until after the steamer's course had been directed towards the opening between the

two vessels at anchor, and when, as he says, she was within 400 yards, (*fols.* 29–73) but when in fact she was considerably nearer, (*fols.* 69, 95, 96, 107.) Whatever that distance may have been it is certain that the steamer was then in dangerous proximity to the schooner, for the pilot and master were greatly alarmed, and immediately shouted two or three times to starboard the wheel (*fols.* 70, 75, 81, 110, 128, 132.) The pilot says that when he gave that order the schooner was not over two hundred yards off, (*fol.* 106.)

(2.) The steamer was also in fault in attempting to pass through so narrow a passage without first ascertaining, not only that it was clear, but that it would so remain while passing.

(*a.*) This was not done, but the steamer kept on at her speed, which, although differently stated by the witnesses, (some stating that she was going at the rate of five, others at the rate of nine or ten miles an hour,) must have been from seven to ten miles an hour.

The pilot of the steamer says (*fol.* 43) she was going at the rate of five miles.

The pilot, who was standing on the brig at anchor, says (*fol.* 119) she was going at the rate of nine or ten miles an hour.

The Master of the schooner says (*fol.* 36) she appeared to be approaching at the rate of ten miles an hour.

Another witness says (*fol.* 57) she was going at the rate of nine or ten miles an hour.

Another says (*fol.* 49) she was going five to ten miles an hour.

The engineer says (*fol.* 87) that her highest speed is 14 knots, requiring 30 pounds of steam, and that at this time she was carrying but 15 pounds, yet she had in fact ran from her dock to the place of collision, a distance of two miles (*fol.* 103) in about 15 minutes, showing that her speed must have been about eight miles an hour. (*Fols.* 85, 102, 103.)

(*b.*) This speed was too great under the circumstances, especially considering the number of vessels at anchor and under way, the difficulty of finding a way for the steamer, and the lack of a competent and vigilant look out.

(3.) The steamer was further in fault in reversing her wheel and putting it to port, after having first starboarded it.

By putting the wheel to starboard, the pilot intended to pass under the schooner's stern, between it and the brig. This movement was correct, and would have been successful in avoiding the schooner if the wheel had been kept to starboard, but for fear of colliding with the brig it was reversed, and thereby the steamer cleared the brig, but struck the schooner. Having been voluntarily placed in dangerous proximity to the schooner and the two vessels at anchor, it was improper to single out the schooner, and to run her down because she was the least value. (*Fols.* 98. 99.)

III.—The schooner was not in fault, she was in the lawful pursuit of her voyage, and the allegations of the appellants that she had no look-out and did not keep her course, are disproved.

(1.) The weight of testimony shows that she kept her course.

(*a.*) The master of the schooner (who had the wheel) says, (*fol.* 36,) he was steering his course between the two vessels so at anchor, and that he held on his course to cross the steamer's bows, and did not alter it; and again, on cross-examination, he says, (*fol.* 43,) "I kept my course to cross the steamer's bows; I did not let my vessel fall off at all or come up in the wind; I altered my wheel, but I say it was only enough to keep her steady; I did not make a turn of the wheel around; I may have turned it a spoke each way, just to keep the vessel steady."

The steward, who was on the deck of the schooner, says, (*fol.* 49,) her course was not altered.

A seaman, who was also on deck, says, (fol. 57,) he did not notice any change in her course.

Another says, (*fol.* 164,) he "don't think her course was changed after she hauled up at Governor's Island and stood over, until the collision."

(*b.*) On the other hand, the testimony which is relied upon to show that she did alter her course, is vague, uncertain and not reliable.

The master of the steamer who did not see the schooner until after the mate reported her, pretends to say (*fol.* 64,) that when she had advanced so as to bear two points on his port bow; "she appeared to have just made out the steamer, as her course was altered all at once to go astern of the steamer."

The mate says, (*fol.* 73,) "when the schooner got out of the range of the brig she put her helm to port and then to starboard."

The man at the wheel says (*fol.* 80,) after he received the order to hard-a-starboard he noticed that the schooner had put her helm to port, which he saw (*fol.* 82,) "by her head falling off."

The pilot says, (*fol.* 95,) when he saw that the schooner luffed he backed the steamer; but he says that when she was reported and he ordered the wheel to starboard, (which was before he so backed the steamer,) she was not over 150 or 200 yards off. (*Fol.* 106.)

The pilot, who was on the stern of the brig at anchor, says, (*fol* 119,) the schooner "luffed a little and then kept off immediately."

Thomson, the passenger, pretends to say that she ported her helm and then starboarded it, but he had no experience and could not state what the effect was of *porting* her wheel. He says it was to bring her more square across the steamer's course, while it must have been directly the opposite.

(*c.*) In this conflict of testimony the master of the

schooner is the most reliable, for, in the absence of any special reasons of which there are none, he must have known whether or not he luffed and then kept off, as that could not have been done without his moving the wheel, which he says he did not (*fols.* 36, 43).

(*d.*) He is moreover corroborated by undisputed facts and circumstances.

That he was steering a straight course between the two vessels at anchor prior to the time when he discovered the steamer, is not disputed, and, therefore, if he altered his course at all, it must have been after he saw her, which was when he opened out from behind the brig. He was then almost in front of and not over 150 yards from the steamer (*fol.* 35), so near that the collision occurred before the schooner run 200 feet (*fol.* 41). It would have been idle to luff under such circumstances; nor did he, as is evident from the way the schooner was struck, which was on her starboard side, where and as she would have been if she had kept her course.

(*e.*) The confusion on board the steamer upon the appearance of the schooner justifies the inference that those navigating her did not pay any special attention to the schooner after she was first seen. Their attention must have been engrossed in efforts to avoid a collision with the brig. (*Fols.* 70, 75, 81, 128, 132, 133)

(2.) Even if the schooner did "luff a little and then keep off," as the appellant's witnesses pretend (*fols.* 118, 119), still such movements did not

cause or tend to cause the collision, nor do they afford any excuse for the steamer.

(*a.*) It is not pretended that such luffing embarrassed the steamer in her efforts to avoid the schooner. Her wheel was not ported, nor was her course altered in the least in consequence of that alleged manœuvre; all that is pretended to have been done in consequence thereof, was backing the steamer (*fol.* 95), which was precisely what she should have done.

(*b.*) But it was said, in the Court below, that although the steamer's movements were not thereby embarrassed, still by luffing and then keeping off, the schooner's onward progress was retarded, but for which she would have passed the steamer's bows in safety. This, however, is mere conjecture. There is no reliable testimony upon the subject. The pilot says (*fol* 95) it was this movement which caused him to back the steamer, and, therefore, if the schooner so lost progress, it was compensated for by slowing the steamer.

(3) Conceding, for the argument, but for no other purpose, that the schooner did luff, and then keep off, thereby retarding her progress and thus tending to cause the collision, still she was not thereby in fault, because such movements were made, if at all, when the steamer was dangerously near, and when her master and crew were in great alarm (*The Pacific*, 21 *How*, 372. *The Carroll* 8 *Wall.*)

(4.) The schooner had a competent look-out (*fol* 35.) His sudden death by cholera (*fol* 35) de-

prived the libellants of the benefit of his testimony. Even if she had not had a look-out, but had, nevertheless, kept her course, she was not in fault. That was her sole duty; and if no person had been on deck except the master at the wheel, and she had kept her course, her duty would have been performed.

IV.—The first exception was allowed in the Circuit, and the decree of the District Court was corrected accordingly. The 2nd and 3rd exceptions were properly overruled. (*Fols.* 143, 170.)

(1.) The 2nd exception was abandoned in the Circuit Court, no argument having been made thereon, and therefore, it ought not to be considered here. It is insisted, however, that the libellants as owners of the schooner, were entitled to recover the value of the cargo which was in their possession as carriers. They properly filed their libel (*fol.* 4), "on behalf of themselves, and of all persons having a common right of action arising out of the collision." *The Propeller Commerce*, 1 *Black.* 574, 582. *The Commander-in-Chief*, 1 *Wall.* 43.)

(2.) The 3rd exception was properly overruled. In cases of tort interest is always allowed by way of damages, as well in Admiralty, as at Common law. In this case, the Commissioner allowed interest by way of damages. (*Fol.* 141.)

V.—Finally, it is respectfully insisted that the decree of the Circuit Court should be affirmed, with interest and costs.

E. H. Owen,
Counsel for Appellees.

OPINION.

U. S. CIRCUIT COURT, E. D.

HENRY P. SIMMONS and others *vs.* THE STEAMSHIP "CITY OF PARIS," &c.,—NELSON, C. J.

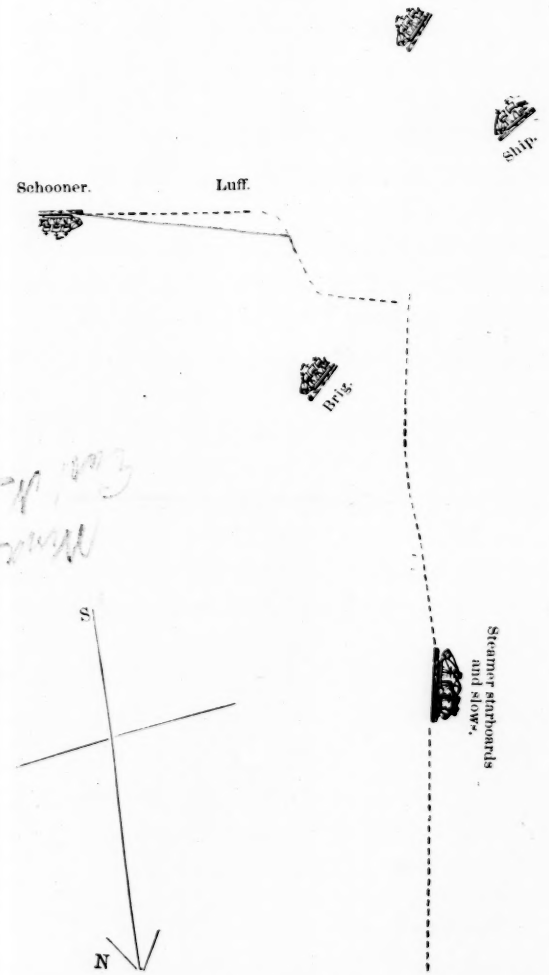
The collision in this case took place between the steamship *City of Paris* and the schooner *Percy Heilner*, between nine and ten o'clock on the morning of the 14th April, 1866, in the harbor of New York, off the lower part of the Battery, between that and the Jersey shore. The steamer had left her berth, Pier No. 45, above Canal street, and was on her way out of the port of New York to sea, by Sandy Hook. The schooner laden with coal from Philadelphia, was bound for Pawtucket, R. I. Having entered the East River she found the tide so unfavorable that she soon retraced her steps, and was on her way to the Jersey shore, there to anchor, and await a change of tide. The wind was E. N. E., blowing fresh from a three to a four knot breeze. The tide was the beginning of ebb, slack. The bay, off the lower part of the Battery was full of vessels at anchor and moving, so as to embarrass the navigation of vessels descending and crossing. The morning was clear, and the view of the bay unobstructed. The schooner was 78 in length, tonnage 107, new measurement. The steamer 375 in length and 40 feet beam, an iron screw vessel, tonnage 1,669. The schooner, in crossing, had the wind nearly free. The vessels were crossing nearly at right angles of each others track. The combined speed of the two vessels at the time was probably ten to twelve miles an hour. When the steamer first discovered the schooner she was about a quarter of mile, or four hundred yards, off her port bow. This is

the concurrent testimony of the master, and mate who reported the steamer On the discovery of the schooner the steamer immediately starboarded her helm, and, as is apparent from the testimony of the mate, the order was given under some alarm, as both master and pilot cried out simultaneously " starboard, hard a starboard." At this time both vessels were embarrassed in their navigation—the schooner passing between a brig and ship at anchor, some four hundred yards apart, both heading eastward, the ship being astern of the brig, some three or four hundred yards, the steamer passing the opening between the stern of the brig and the bow of the ship, directly down the bay and across the track of the schooner, through this latter opening. It is admitted, or at least it cannot be denied, but that, under the circumstances stated, it was the duty of the steamer, according to the established rule to have passed the schooner, so as to have avoided a collision; and hence, the Courts are bound to hold her responsible for the consequences, unless some fault is shown in the navigation of the schooner. This is claimed on the part of respondents. The defence is put upon the point, that, immediately after the steamer had starboarded her helm, so as to enable the schooner to cross her bow, on her way to the Jersey shore, the latter, instead of passing on her course, ported her helm, turning her head up the river, apparently to pass the stern instead of the bow, and again changed, by starboarding, to cross her bows, which two manœuvres, it is alleged, made the collision inevitable. We think the answer upon the evidence to this ground of defence is satisfactory. In the first place, the proofs fail to show such a change of course—if any occurred—by porting the helm, as could have materially led to the disaster. It is wholly denied by the hands on board the schooner. In the next place, the proximity of the vessels was such, at the time the order was given on the steamer to starboard, together with their situation in relation to vessels at anchor in the vicinity, that no movement of the schooner could have prevented the collision. And, in

the third place, the porting of the helm of the schooner, if made at all, was under impending danger from the proximity of the steamer, a vessel five times her length, and more than three times her tonnage, and moving at the time in the water at the rate of from three to five miles an hour. The mate of the steamer admits that at the time the schooner ported she was only from 200 to 300 feet off the steamer. We believe the Court below was right, and affirm the decree. A slight error occurred in estimating the damages. The Commissioner allowed gross freight instead of net. Probably his attention or the attention of the District Judge was not called to it. We direct the difference to be deducted, it being $100, but not to affect the costs of affirmation.

Henrici Young & Son

No. 152.—APPELLANT'S DIAGRAM.



Supreme Court of the United States.

THE LIVERPOOL STEAMSHIP COMPANY, Appellants,

vs.

HENRY P. SIMMONS AND OTHERS, Appellees.

Appellants' Brief in reply.

I. The inspection of the appellees' brief discloses therein so many errors, of fact and law, that we deem it our duty to call the attention of the court thereto, "*seriatim.*"

II. The errors are the following:

a. As to the steamer's speed, the counsel says, on page 2, "*from seven to ten miles an hour,*" while, on page 7, he shows her speed could not have been over eight miles an hour, including a tide of a knot and a half.

b. He says, on page 2, the blow was a "square blow." It was not so, but angling. (See Grace, folio 45; Clayton, folio 53; Blackman, folio 60; Camp, folio 125; J. F. Camp, folio 130. The last two witnesses were passengers.)

c. Libellants' counsel says, in his statement of facts, on page 3, "*that the steamer's wheel was put to starboard,* and afterwards *reversed and put to port;* " and, on page 7, he charges this movement as a distinct fault against the steamer.

Neither in the folios referred to, 99, 109, 110, nor anywhere else, is there anything justifying this; on the contrary, the evidence is positive that no such movement was made. (*Vide,* folios 65, 77, 82, 101, 102, 105.)

d. As to the look-out on the steamer: There were the chief officer and one sailor. The libellant's counsel says, the sailor "was not spoken of by the witnesses as a look-out." But he was. (Kennedy, folio 62; Mathews, folio 72.)

The reason why the sailor is not called, was because he left the ship on a strike in Liverpool, on the voyage on which the collision occurred. (Kennedy, folio 66, page 24.)

e. There were no orders given to the mate, as suggested on page 5, subdivision 6, of appellees' brief.

The mate swears he had nothing to do besides looking out. (Folio 76, p. 27.)

f. He says, on page 5, that the mate was inattentive. The ground of this charge is, that the mate reported the schooner "when she was four hundred yards off, (which is a quarter of a mile,) but when, in fact, she was considerably nearer."

The references which he gives on page 6 of his brief to sustain this statement all show the contrary, and he omits reference to Harbinson's statement, at folio 106, that the schooner was half a mile off when first reported.

g. He says on page 6, that when the schooner was first seen the steamer was in dangerous proximity, "for pilot and master were greatly alarmed, and immediately shouted two or three times to starboard the wheel."

The sole foundation for this is, that the pilot and master both gave the order, "hard a-starboard" together, and it was repeated by the officer between the bridge and the wheel to Fulton. (Folio 80.)

h. He says on page 6, and also on page 9, that "the pilot says that when he gave the order (to starboard) the schooner was not over two hundred yards off." (Folio 106.)

What the pilot says is, that the *brig* was two hundred or two hundred and fifty yards off, but that the schooner was half a mile off.

i. He also says on the same page, subdivision "*a*," that

"the steamer *kept on at her speed*," in face of the fact that the master and pilot of the steamer both say that as soon as the schooner was reported the engine was slowed, and the engineer shows that she ran five minutes with the engine dead slow before the order was given to stop and back, which was when the schooner luffed.

In face of the evidence showing that the steamer could not have run over eight miles an hour, and that she ran five minutes with the engine going dead slow after the schooner was seen, his statement that the steamer *kept on* at a speed "which must have been from seven to ten miles an hour" is, to say the least, a very grave error.

j. He says on page 10, subdivision *e*, that "the confusion on board the steamer on the appearance of the schooner justifies the inference that those navigating her did not pay any special attention to the schooner after she was first seen."

But there was no confusion *on the appearance* of the schooner. The only confusion at any time was among the passengers, and that was after the schooner luffed.

k. He says it is not pretended (page 11, subdivision *a*) that the luff embarrassed the steamer in her efforts to avoid the schooner.

The appellee's counsel does not seem to appreciate *our position*, which is that the steamer took seasonable measures to avoid the collision, which would have been successful had they not been *defeated* (*not embarrassed*) by the movement of the schooner complained of.

T. C. T. BUCKLEY,
R. D. BENEDICT,
Of Counsel for Appellants.

noon
20 yards from stars
4 pm -